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April 30, 2012

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: Christian Marsh *CBM*
Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: High Pressure Steel Cylinders from the People's Republic of
China: Issues and Decision Memorandum for the Final
Determination

SUMMARY

The Department of Commerce ("Department") has analyzed the comments submitted by the Petitioner,¹ the mandatory respondent,² and another interested party³ in the antidumping duty ("AD") investigation of high pressure steel cylinders from the People's Republic of China ("PRC"). Following the Preliminary Determination,⁴ verification, and the analysis of the comments received, we made changes to the margin calculations for the final determination. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of issues for which we received comments and rebuttal comments by parties.

BACKGROUND

The Department published in the Federal Register the Preliminary Determination on December 15, 2011. The period of investigation ("POI") is October 1, 2010, through March 31, 2011. Between January 9, 2012, and January 17, 2012, the Department conducted verification in Beijing and Langfang, of the sales and factors of production ("FOP") responses of the mandatory respondent, BTIC, and its affiliated producer, Langfang Tianhai High Pressure Contain Co., Ltd. ("Langfang"). Between February 9, 2012, and February 10, 2012, the Department conducted

¹ Norris Cylinder Company ("Petitioner").

² Beijing Tianhai Industry Co., Ltd. ("BTIC").

³ Zhejiang Jindun Pressure Vessel Co., Ltd. ("Jindun").

⁴ See High Pressure Steel Cylinders From the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value, 76 FR 77964 (December 15, 2011) ("Preliminary Determination").



verification of American Fortune Company (“AFC”), BTIC’s U.S. affiliate, in Houston, Texas. On March 7, 2012, the Department received an updated data submission from BTIC.

In accordance with 19 CFR 351.309(c)(1)(i), we invited parties to comment on our Preliminary Determination. On March 6, 2012, we received case briefs from Petitioner,⁵ BTIC, and Zhejiang Jindun Pressure Vessel Co., Ltd. (“Jindun”). On March 12, 2012, we received rebuttal briefs from Petitioner and BTIC. On March 16, 2012, the Department released a new wage rate calculation and gave parties an opportunity to comment. On March 26, 2012, BTIC submitted comments regarding the revised labor calculation.

DISCUSSION OF THE ISSUES:

General Issues

COMMENT I: SELECTION OF SURROGATE COUNTRY

Petitioner

Select Thailand

- Thailand appeared on the list of countries found to be economically comparable to the PRC and is a significant producer of comparable merchandise.
- The Thai data on the record are the most complete, reliable, and best reflect the fair market values of the key inputs, namely steel blooms and tubes. The Thai sources for valuing the FOPs are publicly available, contemporaneous, represent a broad market average, come from an approved surrogate country, are tax and duty-exclusive, and are specific to the inputs.
- The record contains financial statements from three Thai producers of comparable merchandise, none of which should be excluded on the basis of subsidies.
- One of financial statements comes from Metal Mate Co., Ltd., a company that produces compressed natural gas (“CNG”) cylinders; it is unclear whether the other high pressure cylinders they produce are scope products.
- One of the financial statements comes from Sahamitir Container PLC., a producer of liquefied petroleum gas (“LPG”) cylinders.
- One of the financial statements comes from Thai Metal Drum Mfg. Public Co., Ltd., a producer of metal drums, which probably would fall within the same HTS 7311.00 classification as the subject merchandise.

If not Thailand, Then Select Indonesia or South Africa

- Indonesia and South Africa provide a complete set of reliable, non-aberrational, broad-based, market value SVs for nearly every FOP in this case.
- The record contains a financial statement from PT Pelangi Indah Canindo, a LPG-cylinder producer, which ought to be considered comparable merchandise, based on the HTS six digit classification under which both they and scope merchandise are categorized.

⁵ Norris Cylinder Company.

- The record contains a financial statement from Nampak Ltd., a South African producer of metal cans and cylinders (including aerosol cans, which hold their contents under pressure).

Do not Select Ukraine

- Ukrainian data are not reliable due to the vast Russian political and economic influence over the steel industry in Ukraine.
- Ukrainian import statistics under HTS numbers 7224.9038 and 7304.5938 reflect imports only from Russia. The Department should not value steel blooms or tubes using Ukraine import statistics as they are not broad-based, and should instead select import statistics from one of the other possible surrogate countries, as the import data from those countries reflect imports from multiple ME countries.
- There has been an increase in import quantities of Russian steel and a decline in AUV of Russian imported steel—not changes indicative of normal market trends. These trends coincide with the increased Russian presence in the steel industry in Ukraine.
- The import data from the Ukraine for steel blooms and billets are aberrational. The AUVs from Ukrainian import data under the six digit 7224.90 and 7304.59 HTS classification from countries other than Russia are more than 150 percent higher than the imported steel from Russia.
- There is not a single import AUV anywhere in the Indonesian, South African, or Thai data for any country that is as low as the Ukrainian AUV.
- There are no Ukrainian financial statements on the record.
- The Department has in such past cases as OCTG and TRB chosen to not value FOPs using sources that are distorted due to not representing true market prices, because they contain few data points, are aberrational, or because they come from a single market economy country.⁶
- With respect to the specificity of chromium and molybdenum content in the Ukrainian imports, the Department should not sacrifice reliability in its quest for specificity.

BTIC

Do not Select Thailand

- There are no Thai sources for valuing the principal inputs, chromoly steel tubes and blooms, that have the specificity to the input that the Ukrainian import data have.
- The record at the Preliminary Determination contained Thai import data for HTS 7224.90 and 7304.59, and the Department rejected it as a source for valuing chromoly steel tubes and blooms.

⁶ See Fresh Garlic From the People's Republic of China: Final Results of the Eleventh New Shipper Reviews, 72 FR 54896 (September 27, 2007) and accompanying Issues and Decision Memorandum (“Garlic”) at Comment 1B; see Steel Wire Garment Hangers from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 47587 (August 14, 2008) and accompanying Issues and Decision Memorandum (“Wire Hangers”) at Comment. 4; see Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decision Memorandum (“OCTG”) at Comment. 20; see Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China: Final Results of Antidumping Administrative Review, 62 FR 61276, 61282 (November 17, 1997) (“TRB”); and see Notice of Final Determination of Sales at Less Than Fair Value: Carbazole Violet Pigment 23 from the People's Republic of China, 69 FR 67304 (November 17, 2004) and accompanying Issues and Decision Memorandum (“CVP 23”) at Comment 3.

- Petitioner initially stated that the import statistics from Thailand are unreliable, even stating that the data may represent misclassified imports or contain other kinds of error.
- The presence of Thai financial statements on the record does not provide a compelling reason to select Thailand as the primary surrogate country. Producers of LPG cylinders and metal drums are not producers of comparable merchandise; LPGs do not have a similar production process, end use, or physical characteristics.
- In other cases the Department has relied upon financial statements outside the primary surrogate country.

Do not Select Indonesia or South Africa

- Record evidence does not support a finding that either Indonesia or South Africa have significant production of comparable merchandise.
- The financial statements from Indonesia and South Africa are inappropriate to use as the merchandise which these companies produce are not comparable to high pressure steel cylinders (“HPSC”).

Select Ukraine

- The specificity of Ukrainian import data for valuing chromoly steel tubes and blooms trumps all alternative multi-country based import data under basket headings from Thailand, Indonesia, and South Africa.
- Petitioner has stated that the key to accurate margins in this investigation are SVs that best capture the chromoly steel blooms and tubes that are used in producing HPSC.
- The chemical composition of the steel used in producing HPSC provides the steel with qualities not present in all other types of alloy steel. Absent a SV for the specific grade of chromoly steel used by BTIC, the next best alternative is a SV for a group of alloy steels that all contain chromium and molybdenum, as the Ukrainian imports do. None of the other sources on the record are specific to alloy steel with the appropriate levels chromium and molybdenum.
- There is no valid reason in this case for placing a greater emphasis on a broad-based SV for chromoly steel rather than focusing on specificity. Even assuming that the Ukrainian import data under the two HTS headings may not be as broad-based as import data from other countries, the data are superior to the alternatives.⁷
- Petitioner misconstrues the analysis employed in past cases where the Department chose to value particular inputs based on a preference of broad market average data over a narrower data, irrespective of specificity questions.
- In OCTG the Department made the surrogate valuation source decision based on product-specificity reasons; the broad-based concerns identified by Petitioner merely was supporting rationale for making the SV choice made.
- In TRB and other cases cited by Petitioner, the Department did not reject Indian data solely out of concerns of an aberrational value, but also out of concerns of the data lacking product-specificity.
- Petitioner presented no substantial evidence that Ukrainian import values for chromoly steel blooms or tubes are distorted by Russian imports. Presented with a similar argument in TRB, the Department rejected the argument of one country’s involvement in

⁷ See Taian Ziyang Food Co. v. United States, 783 F. Supp. 2d 1292, 1330 (CIT 2011) (“Taian Ziyang”), where the Court stated, “(i)f a set of data is not sufficiently ‘product specific,’ it is of no relevance whether or not the data satisfy the other criteria set forth in Policy Bulletin 04.1.”

a foreign country's industry distorting import values as speculative and without supportive evidence.

- The Ukrainian import data's prices are similar to the purchase prices listed in the financial statements from two Indian producers of HPSC, and demonstrate that the import data prices are not distorted.
- Petitioner's comparison of Ukrainian import prices to import prices from other potential surrogate countries from less specific HTS categories do not impeach the accuracy of import values from Russia, as those imports are for steel products that are entirely different from the chromoly steel tubes and blooms.
- Petitioner placed on the record import data from Ukraine for other HTS categories of steel blooms and tubes, however these are for types of steel that cannot be used in producing HPSC.

Department's Position: Section 773(c)(1) of the Act directs the Department to base FOPs on "the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the {Department}." For the final determination, we find that Global Trade Atlas ("GTA") import data for the Ukrainian Harmonized Tariff Schedule ("HTS") numbers 7304.593800 and 7224.903100 offer the best sources for valuing chromoly steel blooms and tubes. Further, SVs for all other FOPs, with the exception of steam, are available from Ukrainian sources. Due to the importance of these factors to an accurate normal value, we find that the greater specificity to the inputs provided by this data results in Ukraine having on balance better data quality for this investigation. As such, we select Ukraine as the primary surrogate country as described below.

In reviewing the GTA import data from Indonesia, Thailand, and South Africa, we note that these data are: 1) from an economically comparable country; 2) contemporaneous; 3) broad market averages; and 4) tax and duty exclusive; and 5) specific to the input only to the extent that HTS 7224.90 (blooms) and 7304.59 (tubes) for Indonesia, 7224.90 (blooms) and 7304.59 (tubes) for Thailand, and 7224.90 (blooms) and 7304.59.45 (tubes) and 7304.59.90 (tubes) for South Africa represent basket categories in which chromoly steel blooms and tubes would fall, but would also include an array of other products covering multiple alloys, grades and sizes of steel blooms and tubes.⁸ Therefore, given the specificity of the Ukraine data compared with the less specific basket categories of the import data from Indonesia, Thailand, and South Africa, the data from Indonesia, Thailand and South Africa are not the best available information for valuing chromoly steel blooms and tubes. Because the Department is heavily weighing the specificity of the surrogate values for inputs in its surrogate country determination, and it is finding that Indonesia, Thailand, or South Africa do not provide the best available information for valuing blooms and tubes, we are not selecting Indonesia, Thailand, or South Africa as the primary surrogate country.

For the Preliminary Determination, the Department selected Ukraine as the primary surrogate country because it offered the best source for valuing chromoly steel blooms and tubes.⁹

⁸ See High Pressure Steel Cylinders from the People's Republic of China; Petitioner's Post-Preliminary Surrogate Value Submission, dated January 31, 2012, at Exhibits I3 (Indonesia SV data) and SA3 (South Africa SV data) ("Post-Prelim SV").

⁹ Preliminary Determination, 76 FR at 77967-77968.

Since the Preliminary Determination, both Petitioner and BTIC have placed significant additional data on the record with respect to Thailand, Indonesia, South Africa, and Ukraine.¹⁰ We now have Ukrainian, Thai, Indonesian, and South African GTA import data to value the primary steel inputs for producing subject merchandise, chromoly blooms and tubes. Petitioner has argued that in selecting a surrogate country the Department should emphasize having usable financial statements to calculate financial ratios. We agree that whether we have financial statements from a particular country factors into our surrogate country decision. However, due to the large extent to which the primary steel inputs, chromoly steel blooms and tubes, drive normal value (“NV”) calculations, and our attempt to calculate as accurate a weighted-average dumping margin as possible, our surrogate country decision in this case is based on which country provides the best source for valuing the primary steel inputs.

Indonesian, Thai, and South African GTA Import Data

Petitioner argues that we should select Thailand as the primary surrogate country. While the same Thai GTA import data to value blooms and tubes were on the record prior to the Preliminary Determination, Petitioner did not propose Thailand as the primary surrogate country until submitting post-Preliminary Determination SVs and in their affirmative case briefs. In the Preliminary Determination, we determined that “the record does not contain quality data {from Thailand}.”¹¹ Indeed, for the Preliminary Determination, the Petitioner stated that these Thai import data are unreliable, and must be either misclassified or that some kind of error occurred.¹² Petitioner argues that if we choose to not select Thailand as the primary surrogate country, we should select either South Africa or Indonesia as the primary surrogate country. Along with the GTA import data Petitioner provided for valuing chromoly steel blooms and tubes, they provided SVs for most of the remaining FOPs.

Ukrainian Import Data

All parties agree that the Ukrainian import data are 1) from an economically comparable country that is a significant producer of comparable merchandise; 2) contemporaneous; 3) tax and duty exclusive; and 4) specific to the input, chromoly steel blooms and tubes. In terms of specificity, GTA import data from Ukraine are for chromoly steel blooms and tubes with chromium and molybdenum contents within the range that BTIC used during the POI and at the eight-digit HTS level. The only difference between the GTA import data from Ukraine and BTIC’s chromoly steel inputs is a certain amount of carbon, which no party has demonstrated to have a significant effect on value.

Petitioner and BTIC disputed whether the Ukrainian import data in fact represent a broad market average, as the only import data from a market-economy country are from Russia, and in the case of chromoly steel tubes, only come from one month of the POI. Based on the imports coming from only Russia, Petitioner argued that the Ukrainian import data do not represent a broad

¹⁰ As in the Preliminary Determination, there continues to be no suitable value for the two key inputs on the record from Colombia or the Philippines, so we continue to find that neither of these countries would be appropriate primary surrogate countries.

¹¹ See Preliminary Determination, 76 FR at 77967.

¹² See Petitioner’s Comments on Selection of Surrogate Country for Antidumping Investigation (September 26, 2011), at footnote 19.

market average. However, Petitioner misunderstands the Department's practice in that the the Department has repeatedly stated that country-wide data represent broad market averages, as opposed to Petitioner's focus on the number of countries represented in that import data.¹³ Here, the GTA import data for steel blooms and tubes from Ukraine represent prices available country-wide in the Ukraine and therefore represent a broad market average. Accordingly, that the source of the market economy imports into the Ukraine may come from one country does not render the prices not reflective of a broad market average. The Petitioner cited to OCTG as precedent for concern regarding a single source country in the import data. However, in OCTG, the Department did not conclude that the import data in question did not represent a broad market average in the surrogate country. Rather, the Department noted that the import data in question represented only two imports of a relatively small quantity from one country, and noted our preference to find a value that would be representative of a range of prices within the POI and statistically and commercially significant. The fact that the imports for steel blooms into the Ukraine in this case are from one market economy source do not present the same concerns as the Russian imports were significant and occurred throughout the POI. With respect to steel tubes, while the imports occurred only in one month of the POI and represented a smaller quantity, such tubes are a specialized chromoly steel product at a greater value-added level than steel blooms, and as discussed below, there is no record evidence indicating that the Ukrainian import data for steel tubes are otherwise not suitable.

Petitioner further questions the reliability of the Ukraine import data, on the basis that all of the imports come from Russia, which it claims is increasing its involvement in the steel industry of Ukraine. Specifically, Petitioner notes that one Russian private business group acquired Industrial Union of Donbass—one of the largest Ukrainian-owned steel manufacturers. Zaphoristal was sold to “unidentified buyers with links to the Russian government,” and, according to Ukrainian officials, the takeover was facilitated by a Russian state bank and Vladimir Putin. However, BTIC noted, and we agree in this case, that direct involvement by one country's steel industry into another country's steel industry is not a sufficient basis for finding that the corresponding import data are distorted. Petitioner has not provided any evidence linking suggested ownership patterns and the imported prices for these specific products. While Petitioner points out that at the same time that there was an increase in Russian involvement in the Ukrainian steel industry, prices decreased and import volumes increased, Petitioner did not provide evidence demonstrating how this is indicative of distorted market trends. While Petitioner relies on evidence of price decreases, we note that the record evidence is not uniform as average unit value (“AUV”) for blooms from Russia in 2009 were \$1.04 per kilogram, were \$0.57 in 2010, but increased to \$0.71 in 2011. For steel tubes, there was an increase in AUV from 2009-2011 from \$1.29 to \$1.54.¹⁴ This demonstrates that Petitioner's contention regarding increased Russian involvement in the Ukrainian steel industry does not establish a link to distorted or aberrational prices. Petitioner argues that comparing AUV from Belarus to that of Russia for blooms reveals a difference of 28 percent. However, we note that Belarus is a NME,

¹³ See Ad Hoc Shrimp Trade Action Comm. v. United States, 618 F.3d 1316, September 8, 2010 (USCAFC); see also Jining Yongjia Trade Co. v. United States, SLIP OP. 2010-134, December 16, 2010 (USCIT).

¹⁴ See Memorandum to the File, from Emeka Chukwudebe, through Matthew Renkey, Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China (“PRC”): Surrogate Values (“SVs”) for the Preliminary Determination, dated December 7, 2011, at Exhibit 3.

a country whose data we do not use when calculating SV,¹⁵ so reference to that benchmark is not relevant. Similarly, Petitioner argues that Ukrainian imports from other countries sharing only the same six HTS categories demonstrate that Russian values are aberrationally low. We find that this non apples-to-apples comparison of differing products unrevealing.

Petitioner also argues that the Russian imports present in the Ukraine import data are aberrational when compared to the AUVs for import data from the other potential surrogate countries at the same six-digit HTS numbers. Petitioner states that there is not a single import AUV anywhere in Indonesian, South African, or Thai import data that is as low as the Ukrainian AUV. Here, similar to above, that these benchmark comparisons with import data from other potential surrogate countries do not impeach the accuracy of AUVs observed in the Ukrainian import data, because the benchmark AUVs are for a basket of alloy steel at a higher level of data aggregation which only might include data for the key factors, while the Ukrainian data does.

In light of the above analysis, we find that the GTA import data for Ukrainian represent the best available information on the record for valuing chromoly steel blooms and tubes because the data are: 1) from an economically comparable country; 2) contemporaneous with the POI; 3) represent a broad market average; 4) tax and duty exclusive; and 5) the most specific to the chromoly steel blooms and tubes used by BTIC. As such, we continue to find Ukraine to be the primary surrogate country for this final determination and will continue to value chromoly steel blooms and billets using Ukrainian import data for HTS 7224.903100 and 7304.593800.

Because the Department has determined that the Ukrainian import data are the best available information, and conversely that the import data from other approved surrogate countries do not constitute the best available information, to value BTIC's steel inputs of chromoly steel blooms and tubes, and because the Department is determining the appropriate primary surrogate country based largely on which country provides the best available information to value BTIC's steel inputs, we will continue to find Ukraine to be the primary surrogate country for this final determination and will continue to value chromoly steel blooms and billets using Ukrainian import data for HTS 7224.903100 and 7304.593800.

COMMENT II: SURROGATE VALUES

A. Financial Statements

BTIC

- Argues that we should continue to use Indian financial statements, from Everest Kanto Cylinder Ltd., ("Everest Kanto"), an Indian producer of identical merchandise, to calculate financial ratios, stating that all other financials are either not specific or unusable due to lack of profit or appearance of subsidies.

¹⁵ See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Steel Concrete Reinforcing Bars From Belarus, 66 FR 8329 (January 30, 2001).

Petitioner

- Argues that we should use Thai financial statements because the companies come from the surrogate country list; if we do not use Thai financials we should use Indonesian or South African financial statements.

Department's Position: For the reasons discussed below, for the final determination, the Department is calculating the surrogate financial ratios for BTIC using the FY 2010 financial statements of Thai Metal Drum Manufacturing Public Co., Ltd. ("Metal Drum"), a Thai company.

Section 351.408(c)(4) of the Department's regulations directs the Department to value manufacturing overhead, general expenses and profit using "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country." In choosing surrogate financial ratios, it is the Department's policy to use data from market-economy surrogate companies based on the "specificity, contemporaneity, and quality of the data."¹⁶ While the statute does not define "comparable merchandise," it is the Department's practice, where appropriate, to apply a three-prong test that considers: 1) physical characteristics; 2) end uses; and 3) production processes.¹⁷ In the selection of surrogate producers, the Department may consider how closely the surrogate producers approximate the NME producers' experience.¹⁸ The Courts have held that the Department is neither required to "duplicate the exact production experience of the Chinese manufacturers," nor undergo "an item-by-item analysis in calculating factory overhead."¹⁹

As noted above in Comment I, for the final determination of this investigation, we have selected Ukraine as the primary surrogate country. It is the Department's preference to value all FOPs with data from the primary surrogate country.²⁰ In addition, it is the Department's well-established practice to rely upon the primary surrogate country for all SVs, whenever possible, and to only resort to a secondary surrogate country if data from the primary surrogate country are unavailable or unreliable.²¹ In this case, there are no financial statements from Ukraine on the record. Therefore, the Department has looked to the financial statements from the alternative surrogate countries for calculating the surrogate ratios.

¹⁶ See OCTG at Comment 13; see also Notice of Final Determination of Sales at Less Than Fair Value, and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People's Republic of China, 71 FR 53079 (September 8, 2006) and Issues and Decisions Memorandum at Comment 1 ("LPP from the PRC").

¹⁷ See OCTG at Comment 13.

¹⁸ Id.

¹⁹ See Nation Ford Chem. Co. v. United States, 166 F.3d 1373 (Fed. Cir. 1999) at 1377 ("Nation Ford"); see also Magnesium Corp. of Am. v. United States, 166 F.3d 1364 (Fed. Cir. 1999) at 1372 ("Magnesium Corp").

²⁰ See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review, 77 FR 15039 (March 14, 2012) and accompanying Issues and Decision Memorandum at Comment 2A; see also Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the Fifth New Shipper Review, 75 FR 38985 (July 7, 2010) and accompanying Issues and Decision Memorandum at Comment 2B; see also Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004) and accompanying Issues and Decision Memorandum at Comment 3 ("Furniture from China").

²¹ See Steel Wire Garment Hangers From the People's Republic of China: Preliminary Results and Preliminary Rescission, in Part, of the Second Antidumping Duty Administrative Review, 76 FR 66903 (October 28, 2011).

In addition to the Indian financial statement used in the Preliminary Determination, the record now contains three financial statements from Thailand,²² one from Indonesia,²³ and one from South Africa.²⁴ These six financial statements are from countries which have been identified on the Surrogate Country List²⁵ as economically comparable to the PRC. We also determined that these countries are significant producers of comparable merchandise. In addition, all six financial statements are contemporaneous with the POI.

For Sahamitr, because its 2010 financial statements indicate it was not profitable, its 2011 quarterly statements are incomplete and unaudited, and there are other profitable companies with usable financial statements on the record, we will not consider Sahamitr's financial statements for the final determination.²⁶

After reviewing both the financial statements from Canindo and Nampak, we have determined that neither of the financial statements from these companies is suitable for use in this final determination. Specifically, Canindo's financial statements lack complete English translations as none of the auditor's notes are translated.²⁷ The absence of complete translations precludes the Department from fully evaluating the financial information set forth in Canindo's financial statements. In regard to Nampak's financial statements, we note that the company is a producer of products which are neither identical nor comparable to the subject merchandise.²⁸ Specifically, Nampak is a manufacturer of: 1) beverage cans, 2) food cans, 3) aerosol cans, and 4) other metal packaging and glass packaging, none of which have similar production processes to the subject merchandise.²⁹ Therefore, we will consider neither Canindo's nor Nampak's financial statements for the final determination of this investigation.

In examining the two remaining financial statements (Metal Mate and Metal Drum), the Department has found that both of the financial statements at issue are contemporaneous with the POI. Metal Mate's statement is otherwise unsuitable for calculating the financial ratios, given that 1) it does not provide sufficient detail to be able to accurately allocate expenses to overhead, SG&A, and profit; and 2) it is missing the auditor's notes.³⁰

Given that Metal Mate's financial statement is not suitable, we now examine the financial statement of Metal Drum. With regard to specificity, we find the production process of metal drums to be reasonably comparable to that of high pressure steel cylinders, because steel

²² These include: 1) Metal Drum; 2) Metal Mate Co., Ltd ("Metal Mate"); and 3) Sahamitr Pressure Container PLC ("Sahamitr").

²³ PT Pelangi Indah Canindo ("Canindo").

²⁴ Nampak Limited ("Nampak").

²⁵ See Memorandum from Carole Showers, Director, Office of Policy, to Matthew Renkey, Acting Program Manager, AD/CVD Enforcement, Office 9: Request for a List of Surrogate Countries for an Antidumping Duty Investigation of High Pressure Steel Cylinders ("HPSC") from the People's Republic of China ("China"), dated August 29, 2011 ("Surrogate Country List").

²⁶ See, e.g., Certain Steel Threaded Rod From the People's Republic of China: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 68400 (November 4, 2011) and Issues and Decisions Memorandum at Comments 4-5.

²⁷ See Post-Prelim SV at Exhibit I-7 dated.

²⁸ See Post-Prelim SV, at Exhibit SA-6.

²⁹ See OCTG at Issues and Decision Memorandum Comment 13.

³⁰ See Post-Prelim SV, at Exhibit T-9, page 115.

cylinders, like steel drums, are a downstream product of steel requiring additional similar manufacturing processes, though we note that the production process is not identical. Additionally, metal drums and high pressure steel cylinders both are used for storage and transport, including for such sensitive products as chemicals. While steel drums and high pressure steel cylinders are not identical merchandise, and BTIC argues that Metal Drum produces steel drums that require welding whereas BTIC's cylinders are seamless as opposed to welded, there is insufficient evidence that this difference would render the financial ratios derived from Metal Mate to be unusable. The Court of Appeals for the Federal Circuit has stated that the Department need not "duplicate the exact production experience of the Chinese manufacturer."³¹ In addition, Metal Drum's financial statement is contemporaneous, publicly available, complete and audited. Therefore, the Department has determined that Metal Drum's unconsolidated financial statement is the best available information on the record to calculate the surrogate financial ratios.³²

We disagree with BTIC that Metal Drum's financial statement is not useable because it includes real estate. We note that the manufacture of metal drum products during the fiscal year represented over 93% by value of Metal Drum's total sales.³³ Therefore, we can conclude that the majority of Metal Drum's economic activity is designated for metal drum production. We also reject BTIC's argument that Metal Drum's financial statements are unusable because of the consolidation of the financial information. We note that while the annual report includes the consolidated results, it also includes the unconsolidated results, which are what we are using in this final determination.³⁴ Finally, contrary to BTIC's claim, there is no evidence on the record that the subsidies in Metal Drum's financial statement are in fact countervailable. The Department notes that its practice is to exclude only financial statements that show evidence of subsidization involving programs that the Department has determined to be countervailable.³⁵

Therefore, given the above analysis, for this final determination, we find that Metal Drum's 2010 unconsolidated financial statement represents the best available information on the record for calculating the financial ratios. Also, because we have found a suitable financial statement from an economically comparable country that is a significant producer, we find it unnecessary to consider Everest Kanto's financial statements. Because Metal Drum's financial statements do not separate out energy and utility costs or water consumption, we will not include these inputs as separate FOPs in calculating the NV for the final determination. As such, any attendant arguments regarding partial adverse facts available ("AFA") for BTIC's water consumption are rendered moot. Finally, because we are not using Everest Kanto's financial data in the final determination, we also need not address BTIC's arguments with respect to adjustments to that company's financial statements.

B. Truck Freight

³¹ Nation Ford, 166 F.3d at 1377.

³² See e.g., OCTG from the PRC at Issues and Decision Memorandum Comment 13.

³³ See Post-Prelim SV, at Exhibit T-9, page 115.

³⁴ Id.

³⁵ See, e.g., Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results And Rescission, In Part, of 2004/2005 Antidumping Duty Administrative and New Shipper Reviews, 72 FR 19174 (April 17, 2007), and accompanying Issues and Decision Memorandum at Comment 1.

BTIC

- The Department should not value truck freight using information from Budmo.org, a website for freight rates in Ukraine.
- The prices for truck freight in Ukraine are inclusive of a 20 percent VAT. Regardless of which source the Department selects for valuing truck freight, it should make an adjustment to account for the VAT.
- Certain assumptions have to be made in order to use Budmo.org for truck freight, specifically, prices listed are in U.S. dollars and there is no explanation for how the currency conversion was made, all prices are for freight originating in Odessa, and there is no reference to the size of the truck or the weight of the cargo.
- Data from Budmo.org may reflect estimates rather than actual transactions.
- The Department should instead value truck freight using Della-ua.com as it references multiple price points in the local currency, the Ukrainian hryvnia (“UAH”).
- Della-ua.com provides the historical average price data for truck freight based on actual transactions.

Petitioner

- Ukraine is not the appropriate surrogate country and accordingly, the Department should value truck freight using a source from Thailand, Indonesia, or South Africa.
- BTIC provides no evidence that prices listed in Budmo.org are based on estimates, nor do they provide any evidence that the prices listed in Della-ua.com are any more reliable than those listed in Budmo.org
- The record contains no discussion of what the Della-ua.com website actually is or where it obtains its content.
- Budmo.org identifies the data source as an organization and is more likely to gather data from more than one entity.

Department’s Position: Section 773(c)(1) of the Act directs the Department to base FOPs on “the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the {Department}.” The data from Della-ua.com meets all of the criteria that the Department considers in selecting the best available information for valuation of a FOP. These data are: 1) from an economically comparable country; 2) represent more of a broad market average to the extent that it contains data for numerous price points and data concerning transport between different sets of cities; 3) tax and duty exclusive, to the extent that we can make an adjustment to the SV to account for the VAT; 4) specific to the input; and 5) is not contemporaneous but is within nine months of the POI. It is the Department’s preference to select a SV source that is priced in local domestic currency or at least to have an explanation for how any currency conversion may have been made. Della-ua.com reports prices in the local currency, whereas Budmo.org reports prices in U.S. dollars. Furthermore, the Department prefers having as many data points and as much explanation of the details related to the prices of services as possible, *i.e.*, size of truck and price per weight of measure, which Della-ua.com does provide, and which Budmo.org do not. While record evidence does not explain who Della-ua.com is or where it obtains its content, we have no record evidence or reason to believe that its data are not reliable. Furthermore, for the reasons listed above, we find that Della-ua.com is preferable to Budmo.org as we would not have to make assumptions, (*i.e.*, the size of the truck, rate per kilogram per kilometer, how exchange rate

calculations were made, and if rates may vary if the starting city is other than Odessa), in order to use the data. Therefore, for the final determination, we will value truck freight using the data from Della-ua.com and make an adjustment to account for the VAT.

C. Labor

BTIC

- The Department must be sure to adjust the financial ratio calculations appropriately by excluding the benefits, retirement provisions, and other categories of expenses from SG&A and factory overhead which are now accounted for in the labor rate.

Department's Position: On March 6, 2012, we placed a new labor calculation on the record based on ILO Chapter 6 Ukraine data. We agree with BTIC that, data permitting, we generally should make any necessary adjustments to the financial ratio calculation to avoid double counting labor expenses. However the financial statement from Metal Drum does not provide sufficient detail concerning benefits, retirement provisions, and other categories of expenses for us to make any such adjustments.³⁶ Therefore, in this final determination, we cannot make any such adjustments to the financial ratios, but we will use the ILO Chapter 6 Ukraine data to value the labor FOPs.

COMMENT III: DOUBLE REMEDY

BTIC and Jindun

- The Department's application of countervailing duty ("CVD") law to China while concurrently treating the country as a non-market economy ("NME") for AD purposes leads to double-counting of the remedy.
- The Department should offset the margin by the CVD rate imposed in the CVD investigation to avoid the prohibition against double-counting.
- In GPX³⁷ the Court stated:
If Commerce now seeks to impose CVD remedies on the product of NME countries as well, Commerce must apply methodologies that make such parallel remedies reasonable, including methodologies that will make it unlikely that double counting will occur.
- At the WTO, the Appellate Body in DS 379 found that the imposition of double remedies is inconsistent with Article 19.3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

BTIC

- If the Department cannot avoid any level of double-remedies or double-counting by making adjustments, the Department cannot reasonably apply CVDs to China.
- In the NME surrogate methodology all of the company's costs, overhead, SG&A, and profit are removed from the normal value calculation and replaced with

³⁶ See Post-Prelim SV at Exhibit T9.

³⁷ See GPX Int'l Tire Corp., v. United States, 645 F. Supp. 2d 1231, 1240 (CIT 2009) ("GPX").

surrogates—all possible effects of the subsidy are eliminated in the AD calculation.

- There are double-remedies arising in this specific investigation.
- The Department's stance that domestic subsidies do not lower U.S. prices is economically wrong, inconsistent with past Department decisions, legally irrelevant, and contrary to the conclusion of other government experts.
- It is wrong to conclude that export subsidies always affect export price ("EP") whereas domestic subsidies rarely do.
- Cost savings that a producer would gain via countervailable subsidies may or may not be passed through to the customer. There is no economic justification to conclude that the producer will always choose to keep 100 percent of the benefit from a domestic subsidy, but will choose to forego 100 percent through a lower price from an export subsidy.
- The Department's past argument that there may be a subsidy that is not captured by its NME methodology is hypothetical and the AD NME methodology already accounts for any possible benefit gained.
- The Department should develop a methodology in this case that addresses the double-counting and double-remedy concerns.

Petitioner

- BTIC's argument regarding double-counting and double-remedies in the application of CVD in NME AD investigations is moot, contrary to established Department practice, and unsupported by the record.
- H.R. 4105 is a measure that will allow the Department to apply the CVD provisions of the Tariff Act of 1930, as amended ("Act"), to imports from NME countries in order to invalidate GPX.
- It is the Department's established practice to exercise its discretion to apply both CVD and AD to respondents from NME countries.
- The mere "potential" of double counting in an NME investigation is not enough to compel the Department to adjust its dumping calculations to offset the CVD. The burden is on the foreign respondent to demonstrate the appropriateness and magnitude of any offsetting adjustment.
- There is no evidence of double-remedies on the record of this case. Rather than point to evidence, BTIC raises arguments that have been invalidate by either congressional action or by established Department practice.
- The Department should disregard BTIC's assertions about double-counting and exercise its discretion to fully and fairly apply both CVD and AD duties in this investigation.

Department's Position: The Department disagrees with BTIC and Jindun that concurrent application of CVD and AD NME methodologies results in a double-remedy and continues to apply the AD NME methodology in this investigation while applying CVD law to subsidized imports of high pressure steel cylinders in the companion CVD investigation. The Court of International Trade's decision in GPX, relied upon by BTIC, was affirmed in GPX CAFC³⁸ but

³⁸ GPX Int'l Tire Corp., v United States, 666 F.3d 732 (CAFC 2011) ("GPX CAFC").

on grounds different than the proposition for which BTIC relies on GPX. However, the GPX CAFC decision is not final. Parties have sought rehearing of that decision and still have an opportunity to exercise additional appeal rights. Additionally, the Court has yet to issue its mandate.

Further, GPX does not support the positions attributed to it by BTIC. GPX did not find a double-remedy necessarily occurs through concurrent application of the CVD law and AD NME methodology. Rather, GPX held that the “potential” for such double-counting may exist. The finding of a “potential” for double-counting in the GPX decision does not mean that the Department must make an adjustment to its dumping calculations in this AD investigation. The SAA places the burden on the respondent to demonstrate the appropriateness of any adjustment that benefits the respondent.³⁹ In this case, BTIC makes failed attempts to demonstrate that there is actual double-counting for steel when the Department preliminarily determined that certain steel⁴⁰ was provided on a less-than-adequate-remuneration basis in the companion CVD investigation. BTIC does not provide any actual costs or prices but instead makes general theoretical arguments about the impact of this subsidy. Therefore, BTIC has not provided any evidence demonstrating how the CVD the Department found on steel in the companion CVD case lowered NV in this AD investigation.

BTIC and Jindun also mistakenly rely on the Appellate Body Report (WTO 2011) as support that the WTO has determined that the application of CVD to the PRC while using NME methodology is contrary to the United States’ WTO obligations. As an initial matter, the CAFC has held that WTO reports are without effect under U.S. law, “unless and until such a {report} has been adopted pursuant to the specified statutory scheme” established in the URAA.⁴¹ Congress adopted an explicit statutory scheme in the URAA for addressing the implementation of WTO reports.⁴² As is clear from the discretionary nature of this scheme, Congress did not intend for WTO reports to automatically trump the exercise of the Department’s discretion in applying the statute.⁴³ Moreover, as part of the URAA process, Congress has provided a procedure through which the Department may change a regulation or practice in response to WTO reports.⁴⁴ For this reason, the Appellate Body Report (WTO 2011) does not establish whether the Department’s application of AD NME methodology and CVD in concurrent investigations results in double remedies is consistent with U.S. law.

³⁹ See SAA at 829; 19 CFR 351.401(b)(1) (“The interested party that is in possession of relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment.”); Fujitsu General Limited v. United States, 88 F.3d at 1034 (CAFC 1996) (explaining that a party seeking an adjustment bears the burden of proving the entitlement to the adjustment).

⁴⁰ See BTIC Case Brief at 21.

⁴¹ See Uruguay Round Agreements Act (“URAA”), Pub L. No. 103-465, 108 Stat. at 4809 (1994) affirmed in Corus Staal BV v. United States, 395 F. 3d at 1347-49 (CAFC 2005), cert. denied 126 S. Ct. at 1023, 163 L. Ed. 2d at 853 (Jan. 9, 2006); accord Corus Staal BV v. United States, 502 F.3d at 1370, 1375 (CAFC 2007); NSK Ltd. v. United States, 510 F.3d at 1375 (CAFC 2007); and PRC Tires 2011 at Comment 13.

⁴² See 19 USC 3538.

⁴³ See 19 USC 3538(b)(4) (implementation of WTO reports is discretionary).

⁴⁴ See 19 USC 3533(g); see, e.g., Antidumping Proceedings (December 27, 2006). With respect to respondent’s argument that the Department’s actions are inconsistent with Article 19.3 of the SCM Agreement, the Department disagrees for the reasons discussed above and further notes that a purported inconsistency with the SCM Agreement is not a permitted basis on which to challenge the Department’s actions under US law. See 19 USC 3512(c)(1).

Additionally, while the Act does not expressly address the issue of concurrent application of CVD law and AD NME methodology with respect to domestic subsidies, on March 13, 2012, President Obama signed into law H.R. 4105, “To apply the countervailing duty provisions of the Tariff Act of 1930 to nonmarket economy countries, and for other purposes.” H.R. 4105 amended the Act, among other purposes, to confirm that, barring an exception not applicable here, the Department must apply the CVD law to subsidized imports from countries designated as NMEs for AD purposes.⁴⁵ New section 701(f) of the Act supersedes the non-final decision in GPX CAFC holding that Commerce cannot apply the CVD law to NMEs, such as the PRC. The new law unambiguously requires the Department to apply the CVD law to NME countries. Additionally, section 772(c)(1)(C) of the Act is instructive. Section 772(c)(1)(C) of the Act provides for an adjustment to the AD calculation to offset CVDs based on export subsidies. Section 772(c)(1)(C) of the Act, combined with the absence of any such corresponding adjustment to offset domestic subsidies, strongly suggests that Congress did not intend for any adjustment to offset domestic subsidies.⁴⁶

AD and CVD laws are separate regimes that provide separate remedies for distinct unfair trade practices. The CVD law provides for the imposition of duties to offset foreign government subsidies. Such subsidies may be countervailable regardless of whether they have any effect on the price of either the merchandise sold in the home market or the merchandise exported to the United States. AD duties are imposed to offset the extent to which foreign merchandise is sold in the United States at prices below its fair value. With the exception of section 772(c)(1)(C) of the Act, AD duties are calculated the same way regardless of whether there is a parallel CVD proceeding.

With respect to section 772(c)(1)(C) of the Act, the legislative history of the export subsidy adjustment establishes only that Congress considered it to satisfy the obligations of the United States under Article VI: 5 of the GATT (“General Agreement on Tariffs and Trade”). The legislative history does not suggest specific assumptions about whether foreign government subsidies lower prices in the United States, *i.e.*, contribute to dumping and, in fact, is not solely

⁴⁵ See section 701(f)(1) of the Act; H.R. 4105, 112th Cong. § 1(a) (2012) (enacted).

⁴⁶ See Central Bank of Denver v. First Interstate Bank, 511 U.S. 164, 176-177 (USSC 1994) (“Congress knew how to impose aiding and abetting liability when it chose to do so. If, as respondents seem to say, Congress intended to impose aiding and abetting liability, we presume it would have used the words ‘aid’ and ‘abet’ in the statutory text. But it did not.”); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 734 (USSC 1975) (“When Congress wished to provide a remedy . . . it had little trouble in doing so expressly.”); Franklin National Bank v. New York, 347 U.S. at 373, 378 (USSC 1954) (finding “no indication that Congress intended to make this phrase of national banking subject to local restrictions, as it has done by express language in several other instances”); Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (USSC 1996) (“Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of clean up costs, and . . . the language used to define the remedies under RCRA does not provide that remedy”); FCC v. NextWave Personal Communications, Inc., 537 U.S. 293, 302 (USSC 2003) (when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”); Dole Food Co. v. Patrickson, 538 U.S. 468, (Congress knows how to refer to an “owner” “in other than the formal sense,” and did not do so in the Foreign Sovereign Immunities Act’s definition of foreign state “instrumentality”); Whitfield v. United States, 125 S. Ct. 687, 692 (USSC 2005) at 216 (noting that “Congress has included an explicit overt-act requirement in at least 22 other current conspiracy statutes” but has not done so in the provision governing conspiracy to commit money laundering).

concerned with the effects of subsidies in the United States.⁴⁷ Thus, although the Act requires a full adjustment of AD duties for CVDs based on export subsidies in all AD proceedings, it provides no basis for concluding that Congress' action was based on any specific assumptions about the effect of subsidies upon EPs. It may be simply that Congress recognized the complexity of the issues that would have to be resolved to provide anything less than a complete offset for export subsidies, and simply opted for a full offset to avoid those potential problems. Whether Congress considered the economic assumptions that might have been behind the failure of the GATT contracting parties to address domestic subsidies in Article VI, Section 5 of the GATT is not clear. In any event, all that the contracting parties may have assumed was that domestic subsidies had a symmetrical effect upon export and domestic prices. This presumed symmetrical impact may have been a pro rata or de minimis reduction in these prices. Thus, it is not correct to conclude that Congress assumed that the GATT contracting parties assumed that domestic subsidies lower EP, pro rata, still less that Congress built any assumptions about the price effects of domestic subsidies into the AD law.

The argument that domestic subsidies inflate dumping margins by lowering EP assumes that domestic subsidies in NME countries do not affect NV. However, while NME subsidies may not affect the factor values used to calculate NV in an NME proceeding, such subsidies may easily affect the quantity of factors consumed by the NME producer in manufacturing the subject merchandise. For example, a domestic subsidy in an NME country may enable a respondent to purchase more efficient equipment in turn lowering its consumption of labor, raw materials, or energy. When the surrogate values are multiplied by the NME producer's lower factor quantities, they result in lower NVs and, hence, lower dumping margins.⁴⁸ Any reduction in factor usage by NME producers would reduce NV in a second manner, because the final factor values are also used to calculate the amounts for selling, general, and administrative ("SG&A") expenses, and profit⁴⁹ that are additional components of NV. BTIC has argued that this position is theoretical and inaccurate because any new equipment purchases would result in a higher SG&A expenses ratio. The Department disagrees because applying the NME methodology is a complex calculation that takes into consideration many factors, such as the cost of capital and administrative expenses. Furthermore, because we use surrogate financial ratios from companies in another country, BTIC's purchase of equipment would not affect its ratios at all under the factors methodology. Hence, additional equipment purchases do not necessarily result in a higher SG&A expenses ratio as there are other factors which could impact the calculations.

Moreover, in determining NV in NME cases, the Department does not exclusively use factor quantities in the NMEs valued in the surrogate, ME country. Some factor values are based on the prices of imported inputs (priced in the currency of the country from which the inputs were obtained or in U.S. dollars). Given that the input suppliers in these countries are often competing with PRC suppliers of those same inputs, it is fair to conclude that those prices are influenced by subsidies in the PRC.

⁴⁷ See Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103-316, vol. 1, at 870 (1994) ("SAA").

⁴⁸ See section 773(c)(3) of the Act.

⁴⁹ See, e.g., Hebei Metals & Minerals Imp. & Exp. Corp. v. United States, 366 F. Supp. 2d 1277 (CIT 2005); Dorbest Limited, et al. v. United States, 462 F. Supp. 2d 1300-01 (CIT 2006).

Finally, in some cases, the NME exports of the subject merchandise will account for a significant share of the world market, enough to influence world market prices. In such cases, particularly where the industry is export oriented or has excess capacity (as is often observed in the PRC), subsidies could increase output and exports from the PRC which, in turn, would reduce the prices of the good in question in world markets. These lower prices would reduce profits for producers selling in these markets which, in turn, would reduce the profit the Department derives from their financial statements, (used as surrogates for the PRC producers) and, thus, reduce NV.

BTIC also argues that the AD NME methodology provides a remedy for any and all countervailable subsidies such that concurrent application of CVDs is necessarily duplicative.⁵⁰ The general premise of BTIC's argument is that concurrent application of AD ME methodology and CVD law does not create automatic double remedies in ME proceedings because domestic subsidies automatically lower NV, and hence the dumping margins, pro rata. The AD NME methodology, on the other hand, produces a NV that is not affected by subsidies in any way, so that it necessarily exceeds what would have been the ME dumping margin by the full amount of the subsidy, thus creating a double-remedy, which the statute requires the Department to offset.

The Department disagrees with this argument. There are several reasons why subsidies in ME cases would not necessarily lower the NV calculated by the Department, pro rata, below what it would have been absent any subsidies. Subsidies can be accompanied with conditions attached that reduce the cost savings to the recipient below the nominal amount of the benefit received. For example, subsidy recipients may be required to retain redundant workers, maintain higher levels of production than would be optimal, remain in economically disadvantageous locations, reduce pollution, obtain supplies from favored sources, and so forth. Even if subsidies are unaccompanied by such requirements, it is not necessarily the case that they will contribute to a lower cost of production. For example, subsidies could be paid out as dividends, used to increase executive pay, or could also be wasted in any number of ways.

Further, the Act provides that NV in ME cases is to be based on home market prices, where possible. Where NV is based on home market prices, the relationship of subsidies to NV becomes yet more tenuous. Not only is the extent to which the subsidies will affect costs uncertain but, even to the extent that subsidies may lower costs, the extent to which the producer will pass these cost savings through to home market or third-country prices is uncertain. Basic economic principles indicate that the prices are a function of the supply and demand for the product in the relevant market, so that any cost savings will be reflected in prices only indirectly.

Finally, to the extent that domestic subsidies lower NV in ME cases, they may lower EP commensurately, so that the dumping margins may not change. Thus, it is not safe to conclude that subsidies in MEs automatically reduce dumping margins, still less that they automatically reduce dumping margins, pro rata.

⁵⁰ See BTIC Case Brief at 8.

In Kitchen Racks from the PRC⁵¹ and Tires LTFV 2008,⁵² the Department did not deduct domestic CVDs from U.S. prices because this would have resulted in the collection of total AD duties and CVDs that would have exceeded both independent remedies in full. The CAFC has upheld this position.⁵³ Similarly, the Department's refusal to treat AD duties and safeguard duties as a cost in AD calculations reflects the Department's effort to collect these distinct remedies in full, but no more.

The Department has explained that the effect of domestic subsidies upon EPs depends on many factors (e.g., the supply and demand for the product on the world market, and the exporting countries' share of the world market), and is, therefore, speculative.⁵⁴ Thus, the Department has determined that domestic subsidies do not inevitably reduce EPs, pro rata.⁵⁵

In considering the impact of domestic subsidies upon EPs, the form of the subsidy is important because, like export subsidies, some domestic subsidies give domestic producers a greater incentive to increase production than others. A production subsidy (e.g., raw materials at reduced prices) reduces the unit cost of producing that merchandise and, therefore, increases the producer's profit on sales of that merchandise. This may give the producer a commercial incentive to increase production of that merchandise. In an NME, however, it is not necessarily the case that economic decisions are made on the basis of such market forces. In any event, more general subsidies (e.g., general grants or debt forgiveness) would not provide that direct incentive. A foreign producer might use a general subsidy to modernize its plant, pay higher dividends, fund research and development, clean up the environment, make severance payments, increase the production of some other product, or waste the money. Consequently, this type of domestic subsidy will not necessarily result in any increase in production and, therefore, will not necessarily result in any reduction in EP, still less an automatic pro rata reduction.

Even if a producer attempted to respond to a domestic subsidy exclusively by increasing production, it might not be able to do so, at least in the short or medium term. Various constraints (e.g., limits on the supply of raw materials, energy, or transportation) might limit its ability to do so. Moreover, capacity expansion is time-consuming. Thus, it would be incorrect to claim that domestic subsidies automatically result in increased production.

Additionally, even if all producers in an NME country do respond to domestic subsidies by increasing production, it is an uncertainty that this increase would result in lower EP. For example, if world market prices are increasing, it is an unrealistic assumption that an NME producer that receives a domestic subsidy will reduce its EP by the full amount of the subsidy, as

⁵¹ See Certain Kitchen Appliance Shelving and Racks From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 74 FR 36656 (July 24, 2009) and accompanying Issues and Decision Memorandum at Comment 1 ("Kitchen Racks from the PRC").

⁵² See Certain New Pneumatic Off-The-Road Tires from the People's Republic of China: Final Affirmative Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 40485 (July 15, 2008) and accompanying Issues and Decision Memorandum at Comment 2 ("Tires LTFV 2008").

⁵³ See Wheatland Tube 2007 (reversing Wheatland Tube v. United States, 414 F. Supp. 2d at 1271 (CIT 2006)).

⁵⁴ See Tires LTFV 2008 at Comment 2.

⁵⁵ See World Trade Organization, World Trade Report 2006; see also Alex F. McCall and Timothy E. Jostling, Agricultural Policies and World Markets, MacMillan Pub. Co., 1985.

allocated under the Department's CVD methodology. Increased production and exports will tend to lower EP over time, but this reduction will be neither automatic nor necessarily pro rata. For example, in previous cases, the ITC has determined that some PRC producers raised their prices in line with world market prices, despite having received substantial subsidies.⁵⁶ Increased export sales will reduce the price of the subject merchandise on world markets only to the extent that the producer or producers in question supply a substantial share of the world market, so that the additional production will drive down prices in that market. Even this will take time and will not occur if other producers in the market reduce production to avoid a price war.

Congress established two separate remedies for what it evidently regards as two separate unfair trade practices. The only point at which the Act requires the Department to reconcile these separate remedies as far as this case is concerned is in the adjustment of AD duties to offset export subsidies.⁵⁷ Because neither AD nor CVD duties are concerned with economic distortion, as such, but are simply remedial duties calculated according to the detailed specifications of the Act, it follows that no overall economic distortion cap for concurrent proceedings can be distilled from the Act.

BTIC's reference to Uranium from France⁵⁸ is misplaced. The Department's statement that, "domestic subsidies presumably lower the price of the subject merchandise in the home and the U.S. markets" does not stand for the firm proposition that domestic subsidies are always passed through into EP, pro rata. This is no more than a presumption, and a very limited one, at that. In Uranium from France, the Department noted that not all domestic subsidies are presumed to be fully passed through into domestic and EP, but that the effect of domestic subsidies on the price in each market presumably was the same. For example, the reductions in price could be one percent of the subsidy in each market.

The Department also disagrees with BTIC's characterization of the Department's previous practice with respect to NME countries and, by implication, Georgetown Steel.⁵⁹ Specifically, it is not the case that the Department determined, in Georgetown Steel, not to apply CVD law concurrently with the AD NME methodology because of distortions. In fact, the Department declined to apply the CVD law to the Soviet Bloc countries in the mid-1980s because of the difficulties involved in identifying and measuring subsidies in the context of those command-and-control economies, at that time. In the underlying Georgetown Steel proceedings, the Department determined that the concept of a subsidy had no meaning in an economy that had no markets and in which activity was controlled according to central plans.⁶⁰

⁵⁶ See Tires LTFV 2008 at Comment 2; see also ITC Final Report (08/2008); see also Circular Welded Carbon Quality Steel Pipe from the People's Republic of China, ITC Preliminary Report, (Publ. 3938 July 2007), at pages V-12 ((Table V-3) V-14 (Table V-5), and V-19.

⁵⁷ For investigations initiated on or after March 13, 2012, which is not the case with this investigation, H.R. 4105 instructs the Department to, where possible, reduce the antidumping duty calculated in an antidumping proceeding by the estimated extent to which a countervailable, non-export subsidy exists and is demonstrated to reduce the average price of imports. See Public Law 112-99, 126 Stat. 266.

⁵⁸ See Uranium from France, 69 FR at 46501.

⁵⁹ See Georgetown Steel Corp. v. United States, 801 F.2d at 1310 (CAFC 1986) ("Georgetown Steel").

⁶⁰ See id.

The CAFC noted the broad discretion due the Department in determining what constituted a subsidy, then called a “bounty” or “grant” by the statute, and held that:

We cannot say that the administrations’ conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law, or an abuse of discretion.⁶¹

As the CAFC stated, even if one were to label these incentives as a subsidy, in the most liberal sense of the term, the governments of these NMEs would in effect be subsidizing themselves.⁶² Thus, Georgetown Steel did not hold that the CVD law could never be applied to exports from an NME country. It simply upheld the Department’s determination that it could not identify a “bounty or grant” in the conditions of the Soviet Bloc that were before it. Because the Department’s prior practice of not applying the CVD law to NME countries was not based on the theory that the NME AD methodology already remedied any domestic subsidies in NME countries, the Department’s current practice of applying the CVD law to exports from the PRC remains consistent with our earlier practice.

Lastly, contrary to its assertion, the GAO Report study cited by BTIC does not create any legitimate doubts about the Department’s interpretation of the Act. While, the GAO Report indicates that the Department has decided to not apply CVD law to NME firms and that this decision has been affirmed in Georgetown Steel,⁶³ as an initial matter, we emphasize that the GAO does not administer AD and CVD laws and has no expertise in AD and/or CVD calculations. As explained supra, the Department has not determined to abstain from applying CVD law concurrently with the AD NME methodology. More importantly, the GAO did not decisively conclude that double-counting occurs when CVD and AD NME methodology is applied. Instead, the GAO Report only states that double-counting may occur.⁶⁴

COMMENT IV: TARGETED DUMPING

Background:

In the Preliminary Determination, we found targeted dumping by time period for BTIC. We then applied the average-to-transaction comparison methodology to all of BTIC’s U.S. sales.

Petitioner

- The Department should continue to apply the average-to-transaction (“A-to-T”) comparison methodology to all of BTIC’s U.S. sales. Section 777A(d)(1)(B) of the Act allows the Department to apply the targeted dumping comparison methodology when determining the existence of dumping margins in an investigation. This method further allows the Department to compare transaction-specific EPs to weighted-average normal values.
- The targeted dumping analysis already accounts for price differences attributable to a U.S. sale as either a CEP or EP transaction.

⁶¹ See id., at 1318.

⁶² See id., at 1316.

⁶³ See GAO Report at 8.

⁶⁴ See id., at 17.

- The Department should continue to use quantity based on pieces for calculating dumping margins and for the targeted dumping analysis because HPSCs are sold in pieces, not kilograms.

BTIC

- The Department's targeted dumping methodology is flawed and arbitrary.
- Challenges several aspects of the Department's targeted dumping methodology including: 1) the Department should apply the A-to-T methodology only to the sales affected by targeted dumping and not to the entire U.S. sales database; 2) even if the Department uses the A-to-T methodology for calculating the dumping margins, the Department should refrain from using zeroing; 3) alleged flaws in the Department's standard-deviation and gap tests; and 4) there are other explanations for price differences (physical differences, EP vs. CEP sales, changes in the price of steel)
- Including alleged targeted sales groups with non-alleged targeted sales groups limits the comparison possibilities of the target group and affects the gap test.
- Weight based quantity should be implemented in cases involving steel products because the weight of steel is directly related to the price of the product.

Department's Position: When calculating dumping margins in an investigation, section 777A(d)(1)(B) of the Act allows the Department to employ the alternative A-to-T comparison methodology if: (1) there is a pattern of EPs or constructed export prices ("CEPs") that differ significantly among purchasers, regions, or periods of time; and (2) such differences cannot be taken into account using the standard methodology (i.e., average-to-average comparison (A-to-A) or transaction-to-transaction comparison methodologies. The targeted dumping test in Nails from the PRC⁶⁵, as modified in Wood Flooring from the PRC,⁶⁶ provide a two-stage analysis to determine whether there is a pattern of EPs or CEPs that differs significantly among purchasers, regions, or periods of time. The first stage addresses the "pattern" requirement; the second stage addresses the "significant difference" requirement. Although the following example refers to a pattern of prices that differ among purchasers, the procedures are the same for analyzing purchaser, regional, or time-period targeted-dumping allegations.⁶⁷

In the first stage of the targeted dumping test, the "standard-deviation test," the Department determines the share of the alleged targeted-customer's purchases of subject merchandise (by sales volume) that are at prices more than one standard deviation below the weighted-average price to all customers, targeted and non-targeted.⁶⁸ The Department performs the standard-deviation test on a product-specific basis (i.e., CONNUM by CONNUM) using the POI-wide, weighted-average prices for each alleged targeted customer, and for customers not alleged to

⁶⁵ See Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances, 73 FR 33977 (June 16, 2008) and accompanying Issues and Decisions Memorandum at Comments 3-6 ("Nails from the PRC").

⁶⁶ See Multilayered Wood Flooring From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 76 FR 64318 (October 18, 2011).

⁶⁷ For the remainder of this discussion, purchaser (i.e., customer) will be used as the example, but the discussion is equally applicable for region or time period allegations.

⁶⁸ See id.

have been targeted.⁶⁹ If that share exceeds 33 percent of the total volume of a respondent's sales of subject merchandise to the alleged targeted customer, then the pattern requirement has been met and the Department proceeds to the second stage of the test.⁷⁰

In the second stage of the targeted dumping test, the Department examines the sales by a respondent to the allegedly targeted customer which passed the first stage.⁷¹ From those sales, the Department determines the total volume of sales for which the difference between the weighted-average price of sales to the allegedly targeted customer and the next higher weighted-average price of sales of identical merchandise to a non-targeted customer exceeds the average price gap (weighted by sales volume) for sales of identical merchandise between the non-targeted customers.⁷² The Department weights each of the price gaps between the non-targeted customers by the combined sales volume associated with the pair of prices to the non-targeted customers that make up the price gap.⁷³ In doing this analysis, the allegedly targeted customers are not included in the non-targeted group; each allegedly targeted customer's average price is compared only to the average prices to non-targeted customers.⁷⁴ If the share of the sales that meets this test exceeds five percent of the total sales volume of subject merchandise to the allegedly targeted customer, the significant-difference requirement is met and the Department determines that customer targeting has occurred.⁷⁵ In such a case, the Department will evaluate the extent to which applying the alternative A-to-T methodology to all U.S. sales unmasks targeted dumping not accounted for using the standard A-to-A methodology.⁷⁶

For the final determination, we continue to find targeted dumping by BTIC. The Act does not mandate a specific test for determining whether a pattern of prices that differ significantly among purchasers, regions or time periods exists. Congress has left the discretion to the Department how to make such a determination. The Department's recent practice is to utilize the targeted dumping test in Nails from the PRC, as modified in Wood Flooring, to identify targeted dumping and, if targeted dumping is determined to exist, then the Department determines whether the standard comparison methodology can account for the identified targeted dumping. If the Department finds that the standard comparison methodology cannot account for the identified targeted dumping then the weighted-average dumping margin is based on the alternative

⁶⁹ See id.

⁷⁰ See id.

⁷¹ See id. at Comment 6.

⁷² See id. at Comment 6. The next higher price is the weighted-average price to the non-targeted group that is above the weighted-average price to the alleged targeted group. For example, if the weighted-average price to the alleged targeted group is \$7.95 and the weighted-average prices to the non-targeted group are \$8.30, \$8.25, and \$7.50, we would calculate the difference between \$7.95 and \$8.25 because this is the next higher price in the non-targeted group above \$7.95 (the average price to the targeted group).

⁷³ See id.

⁷⁴ See id.

⁷⁵ See id. For example, if non-targeted customer A's weighted-average price is \$1.00 with a total sales volume of 100 kg and non-targeted customer B's weighted-average price is \$0.95 with a total sales volume of 120 kg, then the difference of \$0.05 (\$1.00 - \$0.95) would be weighted by 220 kg (i.e., 100 kg + 120 kg).

⁷⁶ See Certain Oil Country Tubular Goods from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decisions Memorandum at Comment 2, ("OCTG from the PRC").

comparison methodology instead of the standard comparison methodology.⁷⁷ In exercising this discretion, for purposes of the final determination, the Department has used the updated test introduced in Nails from the PRC, as modified in Wood Flooring, and applied in several subsequent cases.⁷⁸ Furthermore, the Court of International Trade (“CIT”) has upheld our use of the Nails test, finding it reasonable and consistent with the statute and regulations.⁷⁹ Using this test, the Department has found targeted dumping for the final determination because there was a pattern of prices that differ significantly by time period (i.e., targeted dumping). In doing so, the Department finds that the pattern of price differences identified cannot be taken into account using the standard A-to-A methodology because the A-to-A methodology conceals differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Thus, the Department finds, pursuant to section 777A(d)(1)(B) of the Act, that application of the standard A-to-A methodology would result in the masking of dumping that is unmasked by application of the alternative A-to-T methodology when calculating BTIC’s weighted-average dumping margin.

We disagree with BTIC’s suggestions to modify the Department’s current targeted dumping practice and: 1) not apply a zeroing methodology in conjunction with average-to-transaction comparisons in the calculation of the weighted average dumping margin; 2) only apply the average-to-transaction method to the percent of sales affected by targeted dumping and not the entire U.S. sales database; 3) adopt a de minimis rule; 4) find other explanations for targeted dumping; and 5) use weight based quantity.

Average to Transaction Methodology for all U.S. Sales

Although BTIC argues that it is unlawful to apply the A-to-T methodology to all of a respondent’s sales when targeted dumping is determined, the Department has determined to apply the alternative A-to-T methodology to all of BTIC’s sales on the basis of the Department’s examination of the language in section 777A(d)(1)(B) of the Act.⁸⁰ The only limitations that section 777A(d)(1)(B) of the Act places on the application of the alternative A-to-T methodology are the satisfaction of the two criteria set forth in that provision. When the criteria for application of the alternative A-to-T methodology are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the alternative A-to-T methodology to certain transactions. Rather, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NVs to the EP or CEP of individual transactions.⁸¹

⁷⁷ See Coated Paper from the PRC.

⁷⁸ See, e.g., Certain Steel Nails From the United Arab Emirates: Final Determination of Sales at Less Than Fair Value, 77 FR 17029 (March 23, 2012) and accompanying Issues and Decisions Memorandum at Comments 1-5 (“UAE Nails Final”). See also 4 Wood Flooring from the PRC and accompanying Issues and Decisions Memorandum at Comment; see also, Certain Oil Country Tubular Goods from the People’s Republic of China: Final Determination of Sales at Less Than Fair Value, Affirmative Final Determination of Critical Circumstances and Final Determination of Targeted Dumping, 75 FR 20335 (April 19, 2010) and accompanying Issues and Decisions Memorandum at Comment 13, (“OCTG from the PRC”); see also, Coated Paper/PRC; See also, Nails from the PRC”).

⁷⁹ See Mid Continent Nail v United States, 712 F. Supp 2nd 1370 (CIT 2010) (“Mid Continent Nail”).

⁸⁰ See OCTG from the PRC; See also Coated Paper from the PRC; Wood Flooring from the PRC.

⁸¹ See Coated Paper from the PRC at Comment 3.

Section 777A(d)(1)(A) of the Act requires the Department to use either average-to-average or transaction-to-transaction comparisons (i.e., the standard comparison methodology). The Department has established criteria for determining whether average-to-average or transaction-to-transaction is the more appropriate comparison methodology; the Department generally uses average-to-average comparisons except under relatively rare circumstances that make use of the transaction-to-transaction comparison methodology more appropriate.⁸² The Department does not have a practice of using transaction-to-transaction comparisons for certain transactions and average-to-average comparisons for other transactions in calculating the weighted-average dumping margin for a single respondent. Rather, the Department chooses the appropriate comparison methodology and applies it uniformly for all comparisons of NV and EP (or CEP).

The Department finds that the language of section 777A(d)(1)(B) of the Act does not preclude adopting a similarly uniform application of the alternative A-to-T methodology for all transactions when satisfaction of the statutory criteria suggests that application of the A-to-T methodology is the appropriate method.⁸³ The only limitations the statute places on the application of the alternative A-to-T methodology are the satisfaction of the two criteria set forth in the provision.⁸⁴ When the criteria for application of the alternative A-to-T methodology are satisfied, section 777A(d)(1)(B) of the Act does not limit application of the alternative A-to-T methodology to certain transactions.⁸⁵ Instead, the provision expressly permits the Department to determine dumping margins by comparing weighted-average NV to the EP (or CEP) of individual transactions.⁸⁶

While the Department does not find that the language of section 777A(d)(1)(B) of the Act mandates application of the A-to-T methodology to all sales, it does find that this interpretation is a reasonable one and is more consistent with the Department's approach to selection of the appropriate comparison method under section 777A(d)(1) of the Act more generally. Accordingly, the Department has departed from the practice adopted under the now-withdrawn regulation of applying the A-to-T methodology to only a subset of sales. Instead, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, the Department will apply the A-to-T methodology for all sales in calculating the weighted-average dumping margin. The Department no longer considers it appropriate to use two different comparison methods within the same weighted-average dumping margin calculation. In particular, the Department interprets the definition of "dumping margin" in section 771(35)(A) as calling for a comparison of normal value with EP or CEP. Reading this definition in conjunction with section 777A(d)(1)(B), the Department considers that normal values, EPs and CEPs referenced in section 771(35)(A) may be transaction-specific in nature or weighted averages, depending on the circumstances, but that interpreting these as references to both weighted averages and transaction-specific within the same weighted-average dumping margin calculation, under section 771(35)(B), is not appropriate. Having gained additional experience with the interaction of these provisions in

⁸² See Notice of Final Determination of Sales at Less Than Fair Value: Coated Free Sheet Paper from the Republic of Korea, 72 FR 60630 (October 25, 2007), and the *Matter of Sales at Less Than Fair Value of Certain Softwood Lumber from Canada, Remand Redetermination*, Secretariat File No. USA-CDA-2002-1904-02 (July 11, 2005), at 11.

⁸³ See Carrier Bags from Taiwan (March 26, 2010) and accompanying IDM at Comment 1.

⁸⁴ See id.

⁸⁵ See section 777A(d)(1) of the Act.

⁸⁶ See id.

recent years, the Department finds that section 771(35)(A) and (B) operate more harmoniously with section 777A(d)(1)(B) if this provision is interpreted as establishing criteria for determining whether the A-to-T methodology is the appropriate comparison methodology, not whether the A-to-T methodology is appropriate for some of the transactions of an exporter or producer but not others in the context of a single weighted-average dumping margin calculation. Accordingly, the Department has determined to apply the A-to-T methodology to all U.S. sales, not just those sales that were the specific basis for finding that a pattern of prices that differ significantly among purchasers, regions or time periods.

In regard to BTIC's arguments concerning the Department's change in practice, we have addressed this issue other cases such as in Coated Paper from the PRC,⁸⁷ where the Department determined that the targeted dumping regulation was withdrawn in a determination separate from the AD duty proceeding and a notice of withdrawal was published in the Federal Register.⁸⁸ Consistent with U.S. Supreme Court precedent, a withdrawn regulation cannot constrain the Department's interpretive authority.⁸⁹ Furthermore, the Department has used, and explained, the test it currently uses in numerous cases before this case and provided a summary of the test in the Preliminary Determination in this investigation.⁹⁰ Furthermore, the Department is permitted to change its methodology.⁹¹

Accordingly, consistent with the Department's decision in Coated Paper from the PRC, the Department will exercise its interpretive authority without relying upon the withdrawn regulation.⁹² Thus, if the criteria of section 777A(d)(1)(B) of the Act are satisfied, as is the case in this investigation for BTIC, the Department will apply the alternative A-to-T methodology for all sales in calculating the weighted-average dumping margin.⁹³

Zeroing under the Average-to-Transaction Comparison Methodology in Investigations

The Department does not have a practice of granting offsets for non-dumped sales when applying the alternative A-to-T methodology under section 777A(d)(1)(B)(ii) of the Act.⁹⁴ While it is our standard practice to grant offsets for non-dumped comparisons when using the standard A-to-A methodology in an investigation, we have not adopted a similar standard practice in the context of applying the alternative A-to-T methodology to respondents' sales.⁹⁵ Therefore, to the extent that application of the alternative A-to-T methodology demonstrated that

⁸⁷ See Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 75 FR 59217 (September 27, 2010) and accompanying Issues and Decisions Memorandum at Comment 3, ("Coated Paper from the PRC").

⁸⁸ See id.; Withdrawal of the Regulatory Provisions Governing Targeted Dumping in Antidumping Duty Investigations, 73 FR 74930 (December 10, 2008).

⁸⁹ See United States v. Eurodif S.A., 129 S. Ct. at 878, 885-887 and n. 7 (2009) (explaining that the tolling regulation withdrawn by the Department cannot constrain the Department's interpretive authority under Chevron). Withdrawal of Regulations Governing the Treatment of Subcontractors ("Tolling Operators"), 73 FR 16517 (March 28, 2008) (providing that for immediate withdrawal of the tolling regulation).

⁹⁰ See OCTG from the PRC; Coated Paper from the PRC; see also, Preliminary Determination, 76 FR at 77968.

⁹¹ See, e.g., SKF USA, Inc. v. United States, 537 F.3d 1373 (Fed. Cir. 2010); Nails from the PRC at Comment 1.

⁹² See Eurodif.

⁹³ See Coated Paper from the PRC.

⁹⁴ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During and Antidumping Investigation: Final Modification, 71 FR 77722 (December 27, 2006) ("Final Rule").

⁹⁵ See Final Rule, 71 FR at 77722.

any of BTIC's sales are not dumped, we did not provide offsets for such sales to reduce the amount of dumping found on other sales.⁹⁶

Section 777A(d)(1) of the Act and 19 CFR 351.414 provide the methods by which NV may be compared to EP or CEP. Specifically, the statute and regulations provide for three comparison methodologies: average-to-average, transaction-to-transaction (T-to-T), and average-to-transaction. These comparison methodologies are distinct from each other, and each produces different results. When using the T-to-T or A-to-T methodologies, a comparison is made for each individual export transaction to the United States. When using the A-to-A methodology, a comparison is made for each group of comparable export transactions for which the EP or CEP have been weight-averaged together.

In light of the comparison methodologies provided for under the statute and regulations, we find that offsetting negative comparison results is appropriate when aggregating the results of the A-to-A methodology, and is not similarly appropriate when aggregating the results of the A-to-T methodology, such as were applied in the final determination of this investigation.⁹⁷ We interpret the application of the A-to-A methodology to contemplate a dumping analysis that examines the pricing behavior on average of an exporter or producer with respect to the subject merchandise, whereas under the A-to-T methodology, the Department undertakes a dumping analysis that examines the pricing behavior of an exporter or producer with respect to individual export transactions. The offsetting approach used in conjunction with the A-to-A methodology allows for an overall examination of pricing behavior on average. Our interpretation of section 771(35) of the Act permits zeroing in the A-to-T methodology, as in this investigation, and permits offsetting in the A-to-A methodology reasonably accounts for differences inherent in the distinct comparison methodologies.

In upholding the Department's decision to cease zeroing in the A-to-A methodology in antidumping duty investigations, the Court of Appeals for the Federal Circuit ("Federal Circuit") accepted that the Department likely would have different zeroing practices between the A-to-A methodology and other types of comparison methodologies in antidumping duty investigations.⁹⁸ The Federal Circuit's reasoning in upholding the Department's decision relied, in part, on differences between various types of comparisons in antidumping duty investigations and the Department's limited decision to cease zeroing only with respect to one comparison type.⁹⁹ Section 777A(d) of the Act permits different types of comparisons in antidumping duty investigations, allowing the Department to make A-to-T comparisons where certain patterns of significant price differences exist.¹⁰⁰ The Federal Circuit also expressly recognized that the Department intended to continue to address targeted or masked dumping through continuing its use of the A-to-T comparisons and zeroing.¹⁰¹ In summary of its understanding of the

⁹⁶ See OCTG from the PRC; see also Coated Paper from the PRC.

⁹⁷ See e.g., UAE Nails.

⁹⁸ See United States Steel Corp. v. United States, 621 F.3d 1351, 1363 (CAFC 2010) ("U.S. Steel Corp.") (stating that the Department indicated an intention to use zeroing in A-T comparisons in investigations to address concerns about masked dumping).

⁹⁹ See id. at 1361-63.

¹⁰⁰ See id. at 1362 (quoting sections 777A(d)(1)(A) and (B) of the Act, which enumerate various comparison methodologies that the Department may use in investigations).

¹⁰¹ See id. at 1363.

relationship between zeroing and the various comparison methodologies that the Department may use in antidumping duty investigations, the Federal Circuit acceded to the possibility of disparate, yet equally reasonable interpretations of section 771(35) of the Act, stating that “{b}y enacting legislation that specifically addresses such situations, Congress may just as likely have been signaling to Commerce that it need not continue its zeroing methodology in situations where such significant price differences among the export prices do not exist.”¹⁰² Furthermore, the Court of International Trade recently sustained the Department’s explanation for applying zeroing when using the A-to-T methodology in the context of administrative reviews while not applying zeroing when using the A-to-A methodology in investigations.¹⁰³

As such, our interpretation of section 771(35) of the Act reasonably accounts for inherent differences between the results of distinct comparison methodologies. We interpret section 771(35) of the Act depending upon the type of comparison methodology applied in the particular proceeding. This interpretation reasonably accounts for the inherent differences between the result of the A-to-A methodology and the result of the A-to-T methodology.

We do not find the decision in *Dongbu*¹⁰⁴ and *JTEKT*¹⁰⁵ controlling with respect to our specific practice in investigations of disallowing offsets for non-dumped sales when applying the alternative A-to-T methodology under section 777A(d)(1)(B)(ii) of the Act. These holdings were limited to finding that the Department had not adequately explained the different interpretations

of section 771(35) of the Act in the context of investigations versus administrative reviews, but the Federal Circuit and Court of International Trade did not hold that these differing interpretations were contrary to law. Indeed, the courts have repeatedly upheld the use of zeroing.¹⁰⁶ Furthermore, we note that where average-to-transaction comparisons are used in situations of targeted dumping, the results of not applying the zeroing methodology in those comparisons as well as the results in using average-to-average comparisons would be the same. Therefore, the provision for different comparison methodologies under section 777A(d) of the Act would be meaningless. This outcome could not have been intended by Congress in providing for different comparison methodologies under section 777A(d) of the Act. As such, we find that the petitioner is correct that the intent of section 777A(d)(1) of the Act is not effectuated if offsets are used under the alternative A-to-T methodology. This is so because record evidence shows that for BTIC, the A-to-A methodology masks differences in the patterns of prices between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group. Nor is BTIC’s argument that the WTO has found the use of zeroing to be inconsistent with U.S. international obligations persuasive because no WTO findings have addressed this issue of zeroing in the context of a

¹⁰² See *id.*

¹⁰³ See *Union Steel v. United States*, Consol. Court No. 11-00083, slip op. 12-24 (CIT Feb. 27, 2012).

¹⁰⁴ See *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (CAFC 2011) (“*Dongbu*”).

¹⁰⁵ See *JTEKT Corp. v. United States*, 642 F.3d 1378 (CAFC 2011) (“*JTEKT*”).

¹⁰⁶ See e.g., *SKF USA Inc. v. United States*, 630 F.3d 1365, 1375 (Fed. Cir. 2011); *Corus Staal BV v. Department of Commerce*, 395 F.3d 1343, 1347 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334, 1341-45 (Fed. Cir. 2004).

finding of targeted dumping. In any event, WTO findings have no binding effect under U.S. law.¹⁰⁷

The Department's Gap Test is Flawed and Arbitrary

We disagree with BTIC's assertions that the Department's targeted dumping methodology is flawed and arbitrary. Specifically, with respect to the argument that the one-standard-deviation threshold is far too lenient and a higher, two-standard deviation (or higher) threshold should be applied, the Department has consistently held the one-standard-deviation threshold to be a distinct and reasonable "bright line" to quantitatively measure significant price differences.¹⁰⁸ As from the onset, the use of one standard deviation limits the number of sales that could be considered targeted because no more than 16 percent of all prices would typically be found to be more than one standard deviation below the mean, assuming a normal distribution of prices. In addition, the use of the 33 percent threshold ensures that the volume of those sales for which the prices are more than one standard deviation below the mean must exceed 33 percent of sales considered targeted. Thus, contrary to BTIC's argument, the first stage of the test is not likely to qualify a substantial portion of all sales for which a pattern requirement would have been established.

In addition, as we stated, we find the price threshold of one standard deviation below the average market price to reasonably show a price difference that indicates targeted dumping because: (1) it is a distinguishing measure relative to the spread or dispersion of prices in the market in question; and (2) it strikes a balance between two extremes. This is due to the first being where any price below the average price is sufficient to distinguish the alleged target from others, and the second being where only prices at the very bottom of the price distribution are sufficient to distinguish the alleged target from others.¹⁰⁹ In contrast, the number of sales with prices that are two standard deviations below the average market prices is too restrictive a standard because it would likely only identify outliers in the observed price data and not identify a pattern of targeted prices within the observed price data.¹¹⁰

With respect to the second stage of the test, the price gap test determines whether the price gap associated with the alleged target is significant relative to the price gaps in the non-targeted group "above" the alleged target price gap.¹¹¹ The significance in this context is determined based on whether the price gap associated with the alleged target is greater than the average price gap in the non-targeted group.¹¹² In this regard, we have not set a bright-line standard or threshold, such as a fixed percentage, for measuring the price gap.¹¹³ If the difference exceeds the average price gap found in the group of non-target prices, then the difference in the price to

¹⁰⁷ Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1 at 1032 (1994).

¹⁰⁸ See e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Critical Circumstances Determination: Bottom Mount Combination Refrigerator-Freezers From the Republic of Korea 77 FR 17413 ("March 26, 2012") and accompanying Issues and Decisions Memorandum at Comment 1.

¹⁰⁹ See OCTG from the PRC.

¹¹⁰ See *id.*

¹¹¹ See Nails from the PRC.

¹¹² See *id.*

¹¹³ See *id.*

the alleged target for a specific product is found to be significant.¹¹⁴ In essence, the price gap test qualifies whether a degree of separation between a low targeted price and the next lowest non-targeted prices is sufficient in determining the significant difference in prices with respect to the targeted sales. Further, we consider a five-percent share of sales to the alleged target, by volume, that are found to be at prices that differ significantly to be a reasonable indication of whether or not the alleged targeting has occurred.¹¹⁵ This threshold must be considered with the standard deviation test and the 33-percent sales volume threshold for determining whether there is a pattern of prices that differ significantly, as required by the statute.¹¹⁶

These calculation methodologies, including the standard-deviation and gap tests, and the rationale supporting our targeted dumping analysis have been affirmed by the CIT. Specifically, in Mid Continent, the court found that our use of one standard deviation was not in violation of Section 777A(d)(1)(B)(i) of the Act.¹¹⁷ Further, the court upheld our use of the five percent threshold.¹¹⁸ Specifically, the court stated that, “{i}n other AD contexts, and for a long period of time five percent tests have been used to measure significance for AD purposes.”¹¹⁹ In short, the court concluded that “{t}he various aspects of the nails test do not violate the statutory language of 19 U.S.C. § 1677f-1(d)(1)(B)(i)” and the Department’s tests are “not otherwise arbitrary and capricious.”¹²⁰

We are not persuaded by BTIC’s argument that our price gap test is arbitrary because “randomness” dictates whether the price gap associated with the alleged target is higher or lower than the price gaps in the non-targeted group. Such would be the case if randomness explains differences in the prices that BTIC reported, which we do not find here. Furthermore, BTIC does not point to any specific record evidence to exemplify distortions in the Department’s gap test with respect to BTIC’s reported prices.

We also do not agree with BTIC’s argument that our gap test is arbitrary because it does not consider the weighted-average prices of non-targeted groups that are below the weighted-average price of the targeted group. BTIC does not demonstrate why the significant difference requirement can only be met by the use of gaps that both “look up” and “look down.”

With respect to BTIC’s arguments concerning the use of weighted-average prices in our targeted dumping test, we previously considered and rejected identical arguments.¹²¹ We previously stated that, in exercising our discretion, we interpret “export prices” in section 777A(d)(1)(B)(i) of the Act to mean an average of the individual prices to the alleged target. We stated in Coated Paper from the PRC that “the relevant price variance, in the Department’s view, is the variance

¹¹⁴ See id.

¹¹⁵ See id.

¹¹⁶ See id.

¹¹⁷ See Mid Continental Nail Corp. v. United States, 712 F. Supp. 2d 1370, 1378 (CIT 2010) (“Mid Continent”).

¹¹⁸ See id.

¹¹⁹ See id. at 1378-79 (citing section 773(a)(1)(C) of the Act (for using a five percent test to determine home market viability); section 773(a)(1)(B)(ii)(II) of the Act (for using a five percent test to determine third-country market viability); and 19 CFR 351.403(d) (for using a five percent test to calculate normal value (NV) on the basis of an affiliated party’s sales)).

¹²⁰ See id.

¹²¹ See Coated Paper; see also, Wood Flooring.

in prices across customers, not transactions. For this reason, the Department approached the problem by analyzing the variance in the average price paid by each customer.”¹²²

De Minimis Standard in the Targeted Dumping Test

In calculating dumping margins, pursuant to section 777A(d)(1)(B)(i) of the Act the Department may use the alternative A-to-T methodology if “there is a pattern of export prices...for comparable merchandise that differ significantly among purchasers, regions, or periods of time.” This statutory language does not establish how a pattern of prices should be measured in terms of the prevalence of underlying sales in relation to all sales. Instead, the statute states that there must be a pattern of prices that differ among purchasers, regions, or periods of time, and that the difference must be significant. Thus, the task of finding a pattern under the Nails test involves determining the frequency of low prices in a given group of sales, and not whether the sales in that group were frequent in relation to all sales. In meeting the statutory requirement of establishing a pattern, our use of a standard deviation test first finds targeted sales with prices that comprise 16 percent of all prices (i.e., the left tail of the distribution curve) assuming a normal distribution of prices. At this stage, a certain portion of all targeted sales have prices that are one standard deviation away and below the mean price of all sales in the database. Arguably, this constitutes a pattern because the prices for targeted sales do not comprise the group representing the majority of prices (i.e., 68 percent of all prices, under a normal distribution of prices) that are closer to the mean. In other words, the prices for the targeted sales show the infrequent tendency to differ from the mean of all prices. In order to establish a pattern of low prices concerning targeted sales, our test introduces a 33-percent threshold in determining whether a significant portion of targeted sales were made at prices one standard deviation below the mean of all prices. Because the statute is silent as to what is a pattern in prices, we have discretion to interpret the statutory language so long as our interpretation is reasonable. As we stated before, we do not use the standard deviation measure to make statistical inferences but, rather, use the standard deviation as a relative standard against which to measure the differences between the price to the alleged target and to the non-targeted group. For this purpose, one standard deviation below the average price is sufficient to distinguish the alleged target from the non-targeted group.¹²³ BTIC did not demonstrate why the prices for products corresponding to the sales found to be targeted in this case – regardless of their proportion of overall sales – cannot be found to exhibit a pattern under the statute. Furthermore, although BTIC attempts to strengthen its arguments in favor of a de minimis standard by stating that even one instance of targeted dumping may result in application of the A-to-T methodology and the use of zeroing, BTIC does not argue, or demonstrate, that the Department has only found one instance of targeted dumping by BTIC. Therefore, the facts of this case do not support BTIC’s theoretical argument which, therefore, is irrelevant as far as this case is concerned. We find that the methodology underlying our targeted dumping test in identifying a pattern of prices pursuant to section 777A(d)(1)(B)(i) of the Act is reasonable. As indicated correctly by interested parties, this methodology has also withstood judicial scrutiny.¹²⁴

Other Explanations for the Price Differences

¹²² See Wood Flooring and accompanying IDM at Comment 4.

¹²³ See OCTG from the PRC.

¹²⁴ See Mid Continent, 712 F. Supp. 2d at 1378.

We also disagree with BTIC's arguments concerning finding other explanations for the price differences (physical characteristics, changes in the price of steel, and whether sales were EP or CEP). The Department has analyzed whether or not a pattern existed, and whether or not differences in prices were "significant." Section 777A(d)(1)(B) and legislative history do not require that the Department conduct an additional analysis, as argued by BTIC, and determine the reasons that significant differences in prices exist. The language of the SAA states that "the Administration intends that in determining whether a pattern of significant price differences exist, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."¹²⁵ Thus, while the Department may consider other factors in conducting a targeted dumping analysis, the Statute does not require the Department to determine "why" an exporter's pricing behavior may differ significantly as between different customers, regions or time periods. Instead, the Act requires the Department to determine whether a pattern of export price differences exists without regard to "why." When such a pattern exists, the Act indicates that export prices may not be appropriate for application of the standard A-to-A methodology.

Further, after the initiation of this investigation, based on comments submitted by interested parties, we determined the product characteristics most relevant in the identification of identical products. The targeted dumping test is performed on a CONNUM-specific basis, which identified non-targeted sales of products and alleged targeted sales as having the same CONNUM. As such, there is no basis to conclude that the products underlying the alleged targeted sales were so unique that they cannot serve as proper comparisons in the targeted dumping test. In addition, BTIC provided no argument with respect to why we should define identical products for purpose of targeted dumping analysis differently than how we identify identical products in the dumping margin calculations.¹²⁶ BTIC's argument about increases in the price of steel during the POI influencing the targeted dumping analysis is merely an unsupported assumption without the support of record evidence. As to the fact that some sales are EP sales and others CEP sales, the Department's targeted dumping analysis examines net U.S. price (emphasis added), which would thus account for any differences in price due to different channels of trade. BTIC provides no evidentiary analysis as to how the Department's net U.S. price calculation would not account for such differences.

Also, we do not agree with the premise of BTIC's argument concerning not placing "groups" without targeted sales into the group of sales found to be targeted. The Department examined BTIC's sales for the allegedly targeted period October through December. The Petitioner based its targeted dumping allegation on that period and, accordingly, the Department analyzed the allegation based on that period. BTIC's argument seems to imply that the Department must parse out the period examined into different periods (or groups). However, for purposes of our analysis, October through December constituted the period defined in the petitioner's allegation and the period which the Department examined. The Department did not individually consider October, and November, and December. Furthermore, the statute does not require us to examine any particular time period. Therefore, where the petitioner alleged targeted dumping based on

¹²⁵ See Section 777A(d)(1)(B) of the Act; see also, Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103-316, vol. 1, at 843 (1994) ("SAA").

¹²⁶ See UAE Nails at Comment 1.

the October through December period, the Department properly relied on the October through December period in its analysis.

Weight Based Quantity

Finally, we disagree with BTIC's argument to use a weight based quantity, rather than quantity by pieces, for the final determination. First, we note that throughout this investigation, BTIC has stated that it sells its subject merchandise by pieces. As such, the reported quantities in pieces, rather than by weight, should be used for accuracy and consistency purposes. In addition, at no time in this proceeding has BTIC reported that it sold any of its products by kilogram nor is there any record evidence at all that BTIC stated that its sales were based on kilograms. Furthermore, although BTIC argues that in cases involving steel, the Department should use a weighted-based quantity, if weight were such an important consideration for comparing subject merchandise, weight could have been a consideration in establishing CONNUMs. But it is not. Finally, we note that the Department calculates the standard deviation of the Nails test on a product-specific basis (i.e., CONNUM by CONNUM).¹²⁷ Therefore, for the final determination, we will not apply the weight based quantity to the U.S. sales database and will continue to report BTIC's sales by weight.

Company Specific Issues

COMMENT V: BTIC

A. TARGETED DUMPING-MINISTERIAL ERROR ALLEGATION

Petitioner

- In the Preliminary Determination, the Department stated that invoice date was the date of sale for EP sales while contract date was the date of sales for CEP sales. Yet, in the Targeted Dumping section of the margin calculation, the Department defined the time period using the incorrect variable, resulting in the use of an incorrect date of sale for CEP sales.
- The Department should make a change in the Targeted Dumping section to reflect the correct date of sale for CEP sales.

BTIC

- There is no indication that the Department made a clerical error with regard to the date of sale for CEP sales, it may have been a methodological choice.
- Petitioner has failed to meet the burden of proof demonstrating that the program language was a clerical or ministerial error within the meaning of the regulation.
- Petitioner's proposed change would result in the use of different events for different sales and would consequently distort an analysis that is meant to be on a purely temporal basis.

Department's Position: We agree with Petitioner that we should change the language in the targeted dumping section of the margin calculation program to reflect the correct date of sale for CEP sales. BTIC had itself suggested that for CEP sales, the Department select contract date as

¹²⁷ See Nails from the PRC.

the appropriate date of sale. By making Petitioner's proposed change, we would in fact accomplish that in our targeted dumping analysis.

B. CASH DEPOSIT INSTRUCTIONS

BTIC

- In the Preliminary Determination, the Department found that BTIC and its affiliates, American Fortune Company, Langfang Tianhai High Pressure Container Co., Ltd. and Tianjin Tianhai High Pressure Container Co., Ltd., should be treated as a single entity.¹²⁸
- The draft instructions to U.S. Customs and Border Protection ("CBP") treat the above companies as separate entities.
- The Department should revise the CBP instruction to treat all of the affiliates as a single entity, with a single ten-digit case number.
- BTIC is always the exporter. Having three different case numbers could create liquidation problems.

Petitioner

- There is no basis for revising the CBP deposit instructions.
- There is no guarantee that BTIC will always be the exporter for all sales produced at any of the three production facilities, nor is there a guarantee that all three will remain affiliated producers.
- It is only with three different case numbers that the Department can readily respond to changes in affiliation, provide for the disappearance of affiliates, and identify the producing entity upon entry.

Department's Position: We agree with Petitioner that we should continue using three different case numbers for the producer/exporter combination of BTIC and its affiliated producers. There is no certainty that BTIC will remain affiliated with all the producers or that it will always be the exporter of record. Furthermore, we disagree that changing from three different case numbers to a single one will reduce the likelihood of liquidation problems. To the contrary, with three case numbers it will be absolutely clear to CBP who in fact the producer and exporter entitled to a particular cash deposit rate are and will ensure that the correct cash deposits are collected. Furthermore, it is the responsibility of the importing party to correctly enter its merchandise under the appropriate case number.¹²⁹ Therefore, we are not revising the CBP deposit instructions from three different case numbers to a single case number.

COMMENT VI: Jindun's Voluntary Respondent Status

Petitioner:

- The Department has already rejected Jindun's request for voluntary treatment in this investigation and should continue to do so for the final results.
- The Department has already provided an explanation of its decision.

¹²⁸ See e.g., Preliminary Determination at 77969.

¹²⁹ See 19 USC 1481.

- The Department has made similar decisions in the past where the strain on the Department's resources prevented it from granting voluntary respondent requests.¹³⁰

Jindun:

- The Department improperly rejected Jindun's voluntary respondent request.
- The Department should calculate a margin rate for Jindun because: 1) Jindun timely filed its request for voluntary treatment with the Department; 2) the Department's determination to select only one mandatory respondent and decline Jindun's voluntary treatment request is factually and materially flawed; 3) the Department's failure to accept Jindun as a voluntary respondent is contrary to law; 4) the Department violated Jindun's due process rights as a voluntary respondent; and 5) no evidence on the record indicates that the Department did not have time or resources to select Jindun as a voluntary respondent.

Department's Position: When faced with a large number of exporters/producers, section 777A(c)(2) of the Act provides the Department with the discretion to limit its examination to a reasonable number of companies if it is not practicable to examine all companies due to the large number of exporters or producers involved in the investigation. Consistent with section 777A(c)(2) of the Act, the Department limited its individual examination to a reasonable number of respondents.¹³¹ Based on the facts of this case, we found it reasonable to examine a single respondent which, in this instance, consisted of one exporter/producer and its two affiliated producers of subject merchandise.

As an initial matter, Jindun contends that the Department's decision to limit this investigation to one mandatory respondent was flawed because there was not a large number of exporters or producers involved in this investigation. Although Jindun contends that there were only two exporters or producers to review, the Department determined that there were 10 potential exporters or producers for review, as identified in the petition. The Department determined that 10 companies constituted a "large number" for purposes of section 777A(c)(2) of the Act in light of the significant resources that would be required to review each company.¹³²

Jindun argues because BTIC and Jindun accounted for the largest volume of exports of subject merchandise, the Department should have selected Jindun as a voluntary respondent. The Department informed Jindun in the Preliminary Determination that it would not be selecting a voluntary respondent at that time because it would be unduly burdensome and would inhibit the timely completion of this investigation.¹³³ The Department recognizes that section 782(a) of the Act establishes a separate standard for the treatment of voluntary respondents. As a result, the Department has analyzed the burden and timing considerations, under section 782(a)(2) of the Act when considering whether to individually review an additional voluntary respondent separate from the mandatory respondent selection process provided for by section 777A(c)(2) of the Act. Because the determination of whether the number of companies eligible for voluntary

¹³⁰ See e.g., Certain Frozen Warmwater Shrimp From Thailand: Preliminary Results of Antidumping Duty Administrative Review and Preliminary No Shipment Determination, 77 FR 13082 (March 5, 2012).

¹³¹ See Preliminary Determination, 76 FR at 77965; Memorandum to Christian Marsh, Deputy Assistant Secretary entitled "Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China: Respondent Selection," dated August 25, 2011 ("Respondent Selection Memorandum").

¹³² Respondent Selection Memorandum at 2.

¹³³ See Preliminary Determination at 76 FR 77965.

status “is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of the review” is made after Commerce has limited its examination to a reasonable number under section 777A(c) of the Act, that determination must be made in that context. In other words, the question of whether to accept an additional, voluntary respondent must be considered in light of the company(ies) to which Commerce already limited its examination under section 777A(c)(2), the circumstances of the investigation and the Department’s resources. Under this analysis, even one company requesting voluntary status may be “large” if individual examination of that company would be unduly burdensome and inhibit the timely completion of the review.

In determining whether the Department was able to individually review an additional company as a voluntary respondent, consistent with section 782(a) of the Act, we have contemplated whether doing so would have been unduly burdensome and whether it would have inhibited the timely completion of the investigation. In this instance, the Department considered the fact that the burdensome nature of investigating an additional respondent does not rely on receiving responses to the Department’s initial Section A, C and D questionnaire. Instead, the majority of the burden involves the analysis and verification of each company’s responses to the questionnaire, as well as the corresponding data for both U.S. sales and factors of production data. In doing so, we note that this process regularly results in finding numerous deficient responses to the initial questionnaire. As a result, such deficient responses require the Department to draft supplemental questionnaires, which unlike the Department’s original questionnaire, are specific to each respondent and address each company’s own unique deficient responses; thus creating an additional burden on the Department.

In an original investigation such as this, the Department faces additional burdens and time constraints. The statutory deadline for a preliminary determination in an antidumping investigation is 140 days, which can be extended in certain circumstances to 190 days. See section 733(b) and (c) of the Act. The statutory deadline for the final determination is 75 days after the preliminary determination, which can be extended in certain circumstances to 135 days after the preliminary determination. See section 735(a) of the Act. Fully extended, the Department has less than one year to complete an antidumping investigation, during which time it must learn the manufacturing and sales processes of an industry that it has not likely previously examined. Further, the statute requires verification of the information used in the final determination in investigations. Section 782(i)(1) of the Act. Given these time constraints and requirements, the decision to examine a voluntary respondent must be made early in the investigation, and in particular, prior to a preliminary determination. The short time following a preliminary determination provides sufficient time only to collect minimal additional or missing information, conduct verifications, provide a final opportunity for parties to comment on the record and time for the Department to analyze the data and comments.

This case presented additional burdens. From BTIC’s initial section A questionnaire response, it was evident that BTIC would not be a simple company to investigate because its subject merchandise was produced by three different manufacturers. This meant full data collection on all the FOPs from three separate companies, just as though these were three separate producing respondents. Each of these companies has its own set of books and records, to which its data must be reconciled. Further complicating BTIC’s examination is the fact that some of its U.S.

sales are made through a U.S. affiliate, necessitating a CEP analysis, and involving yet another company's set of data and reconciliations. Each of these companies was subject to verification, and in fact the Department spent nine days verifying BTIC and Langfang at two locations and spent two days at the U.S. affiliate in Houston, Texas. Thus, already with the submission of BTIC's Section A response, in which this structure was reported, the Department knew that examination of this company would be far more complex and time consuming than a single exporting producer selling directly to unaffiliated customers (EP sales) in the United States. These facts were subsequently confirmed in the supplemental questionnaire responses received. The record of this investigation demonstrates that BTIC is affiliated, pursuant to sections 771(33)(A) and (F) of the Act, with two other entities that produce subject merchandise. BTIC provided evidence of these affiliations in its questionnaire responses, as well as ownership/affiliation charts, organization charts, and business licenses/certificates of approval submitted by all four companies.¹³⁴ In total, BTIC and its affiliates, which we have collapsed into a single entity,¹³⁵ comprise one main sales office and three production facilities. Moreover, prior to the Preliminary Determination, it was necessary to issue an initial questionnaire and four additional supplemental questionnaires to BTIC. In responding to both the original and supplemental questionnaires, BTIC requested and received four extensions totaling 30 days. In sum, BTIC submitted voluminous information in its questionnaire responses that we analyzed and considered even before our Preliminary Determination. In addition to the responses submitted by BTIC, we also received and reviewed voluminous information from three separate rate respondents who submitted separate rate applications.

Even without the burden of taking on an additional company as a voluntary respondent, the Department had to fully extend the Preliminary Determination due to the extraordinarily complicated nature of this investigation. The analysis in this investigation not only included the individually examined respondent and the three separate rate respondents, but also the selection of surrogate country and SVs, for which we received voluminous comments from both BTIC and Petitioner, much of which was prior to the Preliminary Determination.

Based on the above, reviewing an additional respondent's questionnaires, issuing supplemental questionnaires, analyzing its particular circumstances, including any affiliations,¹³⁶ verifying the submitted information and calculating an additional individual margin rate would have unduly burdened the Department and inhibited the timely completion of this investigation, within the meaning of section 782(a) of the Act.

¹³⁴ See BTIC's Section A Response for Beijing Tianhai Industry Co., Ltd. Antidumping Duty Investigation on High Pressure Steel Cylinders from the People's Republic of China exhibits 11 and 13, dated August 26, 2011 ("BTIC's Section A response"); see also BTIC's Supplemental Section A Response for Beijing Tianhai Industry Co., Ltd.: Antidumping Duty Investigation on High Pressure Steel Cylinders from the People's Republic of China, dated October 13, 2011 ("BTIC's supplemental section A response"), at 3 through 5.

¹³⁵ See Preliminary Determination, 76 FR at 77968-77969.

¹³⁶ See BTIC's Section A Response; see also BTIC's supplemental section A response, at 3 through 5.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation program accordingly. If accepted, we will publish the final results of review and the final dumping margins in the Federal Register.

AGREE ✓

DISAGREE _____

Ronald K. Lorentzen

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

April 30, 2012
Date